

~~FCC MAIL SECTION~~

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 before the
 Federal Communications Commission
 Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 95-137

In the Matter of

Amendment of Section 73.202(b) RM-8683
 Table of Allotments,
 FM Broadcast Stations.
 (Milton, West Virginia and
 Flemingsburg, Kentucky)

**NOTICE OF PROPOSED RULE MAKING
 AND ORDER TO SHOW CAUSE**

Adopted: August 16, 1995;

Released: August 28, 1995

Comment Date: October 19, 1995

Reply Comment Date: November 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Simmons Broadcasting Company ("petitioner"), licensee of Station WFXN(FM), Channel 292A, Milton, West Virginia, proposing the substitution of Channel 292B1 for Channel 292A at Milton, West Virginia, and the modification of Station WFXN(FM)'s license accordingly. To accommodate the upgrade, petitioner also proposes the substitution of Channel 236A for Channel 292A at Flemingsburg, Kentucky, and the modification of Station WFLE-FM's license accordingly. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the proposal warrants consideration since it could enable Station WFXN(FM) to expand its coverage area. An engineering analysis has determined that Channel 292B1 can be allotted to Milton, West Virginia, in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.7 kilometers (0.5 miles) southeast to avoid short-spacings to the allotment and application sites for Station WRZZ-FM, Channel 291A, Elizabeth, West Virginia.¹ Additionally, Channel 236A can be allotted to Flemingsburg, Kentucky, in compliance with the Commission's minimum distance separation requirements at Station WFLE-FM's presently licensed site.²

3. In accordance with Section 1.420(g)(3) of the Commission's Rules, we shall propose to modify Station WFXN(FM)'s license without entertaining other expressions of interest in the use of Channel 292B1 at Milton, West Virginia, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. In addition, we shall direct an *Order to Show Cause* to the licensee of Station WFLE-FM at Flemingsburg, Kentucky, as to why its license should not be modified to specify operation on Channel 236A in lieu of Channel 292A.

4. Whenever an existing licensee or permittee is ordered to change frequency to accommodate a new channel allotment, Commission policy requires the benefiting party, or parties, to reimburse the affected station for costs incurred. See *Circleville, Ohio*, 8 FCC 2d 159 (1967). Petitioner has stated its willingness to reimburse the licensee of Station WFLE-FM for reasonable costs associated with moving to Channel 236A.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

| | Channel No. |
|------------------------|------------------|
| City | Present Proposed |
| Milton, West Virginia | 292A 292B1 |
| Flemingsburg, Kentucky | 292A 236A |

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Fleming County Broadcasting, Inc., licensee of Station WFLE-FM, Flemingsburg, Kentucky, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 236A in lieu of Channel 292A.

7. Pursuant to Section 1.87 of the Commission's Rules, Fleming County Broadcasting, Inc., may, not later than **October 19, 1995**, file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Fleming County Broadcasting, Inc., to furnish additional information. If Fleming County Broadcasting, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Fleming County Broadcasting, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

¹ The coordinates for Channel 292B1 at Milton are North Latitude 38-29-02 and West Longitude 82-12-59. We note that the coordinates are short-spaced to Station WRZZ-FM, Channel 291A, Ravenswood, West Virginia. However, in accordance with the modification provisions set forth in the *Report and Order*, MM Docket 94-15, Station WRZZ-FM has been ordered to move to Elizabeth, West Virginia. See 10 FCC Rcd 318 (1995). Therefore, since the Milton allotment is dependent upon the

relocation of Station WRZZ-FM from Ravenswood to Elizabeth, West Virginia, the issuance of a license for Channel 292B1 at Milton may be withheld until the license at Elizabeth is granted. We will provide the licensee of Station WRZZ-FM with a copy of this *Notice of Proposed Rule Making and Order to Show Cause*.

² The coordinates for Channel 236A at Flemingsburg are North Latitude 38-24-42 and West Longitude 83-34-41.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following:

Fleming County
Broadcasting, Inc.
P.O. Box 452
Flemingsburg,
Kentucky 41041
(Licensee of
Station WFLE-FM)

MediaCom, Inc.
P.O. Box 1346
Parkersburg,
West Virginia 26102
(Licensee of
Station WRZZ-FM)

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **October 19, 1995**, and reply comments on or before **November 3, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Alan C. Campbell, Esq.
Irwin, Campbell & Tennenwald, P.C.
1320 18th Street, N.W.
Washington, D.C. 20036
(Counsel for Petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be

served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.